

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

OCT 3 1975

75-1168

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P/S

TO: The United States Court of Appeals, Second Circuit

FROM: John J. Flynn, appellant pro se

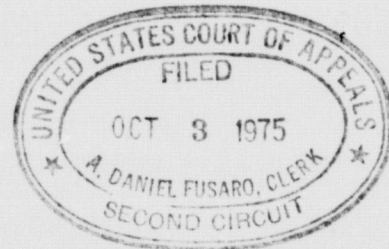
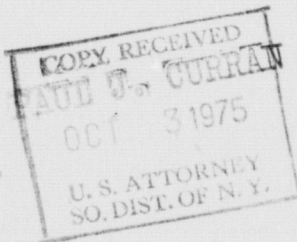
RE: United States of America

v

75-1168

Flynn

Brief and Appendix



PAGINATION AS IN ORIGINAL COPY

Bicentennial Dedication

- 1) Vain are the thousand creeds
That move men's hearts - unutterably vain;
Worthless as withered weeds,
Or idlest froth amid the boundless main
(from Emily Bronte's No Coward Soul is Mine)
- 2) There's a stake in your fat, black heart
And the villagers never liked you.
They are dancing and stamping on you.
They always knew it was you.
Daddy, daddy, you bastard, I'm through.
(from Sylvia Plath's Daddy)

- 3) the life and work of Elizabeth Cady Stanton.

This effort is dedicated to the return to the primacy of the female principle in this, the zero year of my country's classical renaissance. The history of twenty five centuries of recorded male dominance is quite enough.

As we approach the elliptic curve of the next millennia, let us hope that the shift in power from the male to the female of the species can be accomplished with a peaceful glow.

The Eagle is ash: slow is the early rise of the Phoenix.

Preface

My dear Cardinals,

Bishop Wyatt of Southern sent me over.

I went one for two on the regular court and
it's on to the Appellate for overtime.

I did a lot of genuflecting earlier in life,
so don't expect it here.

I am the irish of the species, the black italian
jew. Now and then I unzip the language, just to hear it sing.

This Daniel is still alive.

flynn of elmhurst
appellant pro se

Foreward

There were no lawyers in Athens in 399 B.C. That's the year good Old Sock took it on the chin as 501 jurors voted 281-220 to do him in. The charges were flimsy and the evidence weak, but the times they were tumultuous.

The prosecutors were three: Anytus, a prominent politician and patriot; Meletus, a lousy poet who doubled as religious zealot; and Lycon, a professional orator. Dusting off an old 'impiety' law, his accusers charged him with a) not worshipping the official gods of the city and b) corrupting youth.

Now Old Sock had made an enemy or two in his 70 years of body time. He was swift in the word and his aim was true and he probably bruised an ego or two; he had an eye for a curve and his appetites were hardy; he could play, he could party. Aristophanes, the great comic playwright of the 5th century B.C., raked him over the coals in 423 B.C. before 15,000 at the Theatre of Dionysius in a play called The Clouds. And he did it again and again in The Birds (414 BC) and The Frogs (405 BC), warning his audience against 'jabbering' with 'the odious Socrates.' Reigning pols came after him too but the gods protected the man who followed the passion of his 'inner voice' with courage, wit and intelligence.

When, according to law, Old Sock was given the opportunity to suggest an alternative to the death penalty, his first suggestion

was free room and board for life at the town hall. Many of the 501 did not relish his sense of humor. He then offered the state 30 pieces of silver. Both offers were declined by a vote of 289-212. And so he was to die.

Phaedo: the sacred ship has returned from Delos and by sunset the Sock must die. His friends come early to the jail-tomb on the last day and wait outside while the Eleven supervise the removal of his chains and administer the last rites of the state. When his friends enter the cell, they find him rubbing his leg and musing about the intimate relationship between pleasure and pain. Cheerful he is and talkative too.

He and his cronies toss around a few of the ideas discussed in Athens at the time: life and death, body and soul, the gods as guardians of men, the good and the true, virtue and wisdom, knowledge as recollection, beauty, justice, the existence of the soul before birth and after death, fear and desire, a theory of opposites, harmony, change, equality, the concreteness of the abstract. The usual marketplace stuff.

The time has come to die. The jailer approaches and calls Old Sock the noblest, the gentlest and the best who every passed his way. In tears, he leaves the cell to fetch the cup of hemlock. A friend bids him dealy the taking of the poisonous draught for a little while, but Sock refuses and the hemlock is brought in by the jailer. Handed the cup, Old Sock toasts the gods and cheerfully downs the drink with one long swallow. He walks about the cell until his legs feel weak and then lays down to die. As the poison spreads, he remembers a debt and bids a friend repay it

after he is gone. And then, in the infancy of his old age, Old Sock drops his body and his spirit is released into death. The sun sinks into the earth: he is free, he is free...

Freshness is more than the east wind blowing round one.
There is no such thing as innocence in autumn,
Yet, it may be, innocence is never lost.

(Stevens; LDNC, XLIV)

Counterpoint

Socrates, you dreamer! Justice was just a dream some of you guys had, a dream reduced to ash in the furnace of our time. People dream and Government translates the dream into nightmare; the coffins are countless. Though still talked about with traditional reverence, Justice sounds hollow in a century where Government has aided and abetted the untimely deaths through war, massacre and starvation of over one hundred million of its people. My Country and its predecessors have done their share to hollow the sound.

The virtue of justice resides within the body of the person and it has never been successfully transplanted to any state or government organism within the historical time tenure of Herodotus to Nixon. The Department of Justice, home of the hollow sound, is the vehicle the government uses to nail the coffin down and shove it into the ground. If, after completing the process of conviction, the corpse is still restless, sometimes the victim is wheeled over to the Appellate Wing for re-examination.

Justice has its subdivisional pillars. Equal Justice, that Rock, is one of them. As is Innocent Until Proven Guilty. Though both are bad mythology, their praises are still sung in the courtrooms, the corridors and the halls. Nixoned to shreds, the language can barely support the weight of hypocrisy that creaks into view with each genuflection to these two Holy Rocks.

All governments lie. Ours has not been too successful lately. According to N.Y. Times columnist Anthony Lewis, a Cambridge Research Institute poll shows that 68% of the American people now believe that our leaders have been lying to us for years. And most of our political leaders are lawyers. Watergate is just the tip of the iceberg; thousands of lawyers labored below the surface to salvage the Lie. Politics is the main arena of the Lie and lawyers are its most skilled practitioners.

Prosecutors are government lawyers. Protected by their position of power and knowledge, they sometimes lose perspective in their lust for the win column. And when they overextend themselves, they use the law to cover-up. This case is a classic case of prosecution cover-up. As we probe further into the body of this brief, the extent and degree of the prosecution conspiracy to obstruct justice will be spotlighted.

This case is not the People versus Flynn; it is a bunch of prosecution lawyers against one citizen. Hiding behind the protective shields of District Attorney's Office, Law, and Endless Public Funding, they have misused the power of their office to gain a conviction to cover-up their own unethical and extra legal practices.

The Law is a wind whose velocity needs regulation. Those in positions of power have the responsibility to summon the wind and funnel it in the right direction with a timely and sufficient force. Overvelocity is the enemy of us all: the law out of control is far worse than no law at all. This is a case that got out of control in the lower court.

Power is not defined; it is felt. Lots of money, lots of power are in the hands of a federal D.A. Perhaps by focusing our attention on one federal case, we can sprinkle some light on the legal system as quarterbacked by the government's lawyers.

Person is the singular of people and each person is the center of his own observations. As Holmes puts it: "the life of the law has not been logic: it has been experience." It is my live experience with the process of law that I intend to concentrate on in this brief, not subsection six, paragraph eight. For the first time since 1972, the facts and circumstances of this case are going to be examined from the viewpoint of the defendant citizen steamrolled into a conviction by the government's legal arm.

Language, perspective and justice as fair play. These are the ingredients that form the nucleus of my case. It is a case of them versus me with three judges as referee. The case study before the Appellate begins in 1972 in Eastern, moves over to Southern and includes three criminal cases along the way.

Case One (Eastern 72 CR 146): 10 pounds of Cocaine

On February 2, 1972 Kathryn Ann McGrath, age 25, is arrested by customs agents at Kennedy Airport when she attempts to enter the country with a false-bottom suitcase containing ten pounds of cocaine. She leads the narcotics team to an apartment on East 78th street in Manhattan where Mamie Elizabeth Lynch, age 21, is taken into custody by the authorities. Two others, Melba Kay Hannesson and Howard Warshaw are arrested at Kennedy the next day.

On 2/4/72, all four are indicted in Brooklyn at Eastern District Federal Court, docket number 72 CR 146.

McGrath and Lynch are released on bail, Hannesson and Warshaw are sent to jail with bail amounts of \$100,000 and \$150,000 respectively. Of the four, only Warshaw had a previous record.

I knew and was on friendly terms with all four defendants. As a friend, I visited both Warshaw and Hannesson in jail. On the advise of Nancy Rossner, Hannesson's lawyer, I made no attempt whatsoever to contact McGrath. Rossner did point out, however, that if McGrath contacted me, it was certainly my right as a friend to meet with her.

From March 1, 1972 through March 17, 1972 I attended as spectator-friend four bail reduction hearings in Hannesson's behalf in Judge Leo F. Rayfiel's courtroom. Along with two other friends, I agreed to sign for \$100,000 in an effort to gain Hannesson's release from jail. Bail efforts failed as her release was made contingent upon her father's signature. As a direct result of my four appearances in the courtroom on behalf of Hannesson, the prosecution team, led by Edward J. Boyd V, then Chief of the Criminal Division, decided to entrap me into the commission of a crime. To this end, McGrath was instructed by the prosecution to contact me by phone and to arrange a meeting between the two of us.

From 3/31/72 through 4/7/72, the government recorded seven conversations between McGrath and me, five of which were used against me two years later in Southern criminal proceedings. More

on these five tapes later when we get to Case Three.

In general, it is my contention that these tapes were made in direct violation of my constitutional rights under the 1st and 4th amendments to the Constitution of the U.S. They constituted an unwarranted invasion of my privacy. One party agreement is nonsense in this case. Because of her position, McGrath was forced to comply with the government conspiracy to extend the parameters of its case. Further, circumstances clearly show that the tapes were initiated as a reprisal for my court appearances on behalf of Hannesson.

By August of 1972, the four principals in the case had pleaded guilty. Lynch got five years probation, McGrath three and Hannesson got two years in jail. Warshaw, on probation for a previous drug conviction when he was arrested on this one, was not sentenced as he had now agreed to cooperate with the government. This cooperation took the classic form of implicating others to save his own neck. And so it came to pass that the prosecution was successful in launching its fall production, a creative 14-count indictment featuring a cast of eleven defendants.

Case Two (Eastern 72 CR 1184): The Million Dollar Bust

It could be said that Case One walked right into the arms of the law on 2/2/72 when Kathryn McGrath flashed into Kennedy with ten pounds of cocaine in her bag. Case Two was more of a creative act.

At the time of her arrest, a newspaper story estimated the street value of the cocaine at about \$200,000. With no new narcotic

substance to star in Case Two, the prosecution re-called the same ten pounds that had done so well in Case One. This time round, however, the N.Y. Times gave the ten pounds of cocaine "an estimated street value of 1.3 million." (N.Y. Times, 10/17/72, page 48, column 8). The N.Y. Post featured the story on page three as a million dollar bust. Boyd V called it a major drug case. The language was taking a beating. The election of Nixon was near.

Of course, its nice to have a 'schedule II narcotic drug controlled substance' as part of a drug bust, especially a major drug bust. But what the hell, who's perfect? Just bring back the original ten pounds, feed the newspapers a street value line of over a million bucks and presto, a major drug case, prosecution style, is manufactured. In the prosecution P R Con game, initial impact is more significant than substantive data.

Meanwhile, the original ten pounds has been locked away in the Police Warehouse since February of 1972. Remember the warehouse? Hundreds and hundreds of pounds of cocaine and heroin stolen by the police. Now that's what I call major. So much for background dissonance: the obvious hypocrisy of the Department of Justice and its lawyers has already been well-documented by the history of the times.

The Warrant of Arrest

Dated 10/13/72 and executed on 10/16/72, the warrant, as it pertains to me, reads as follows:

On or about and between the 1st day of May 1971, up to and including the 13th day of October 1972...the defendants...and John Flynn did conspire to knowingly and intentionally

import into the U.S. from Bogata, Columbia, large quantities of cocaine,....

The defendants...and John Flynn, did further conspire to knowingly and intentionally possess with intent to distribute large quantities of cocaine,....

Further statements...by Howard Warshaw to the effect that sometime in early April 1972, he was visited by the defendant John Flynn who brought him a message from the defendant Marc Etra stating that if he, Warshaw, were to expose Etra's position in the aforementioned conspiracy Etra would use all of his family's finances and legal power to crush Warshaw and his family.

Each and every statement is a lie.

Bust, Book and Bail: 10/16/72

I was arrested at gunpoint in my apartment in Elmhurst, Queens by two narcotics agents. They had a warrant of arrest but not a search warrant. My apartment was searched and the agents confiscated a) \$3,600 in cash, b) four bankbooks and c) other personal items.

After the booking process, a bail hearing was held before Magistrate Max Schiffman. Prosecutor Boyd and Magistrate Schiffman agreed to set bail at \$15,000 and I was sent to Nassau County Jail in direct contradiction of the sense and sentiment of the Federal Bail Reform Act of 1966 and the Supreme Court decision that says the only reason for bail is to insure the defendant's appearance in court. A 24-hour bail reduction hearing was scheduled.

Ten Days Later...

On 10/25/72, at a hearing before Judge Mark A. Constantino,

my bail was reduced to \$10,000 bond on the signatures of my father, my brother and myself. My bail reduction hearing of 10/17/72 was cancelled because Prosecutor Boyd was presenting his case to the grand jury - for the first time - on that date. The grand jury indictment finally came through on 10/24/72, the day before my release from jail.

Indictment 72 CR 1184

This indictment features fourteen counts and eleven defendants. One through Thirteen connect ten of the defendants with a narcotics (cocaine) conspiracy while Fourteen is reserved for me. It is the only count on which I was charged by the grand jury. The first twelve counts cover possession, importation and intent to distribute by the other ten people in the indictment and Count Thirteen charges the same people with conspiracy to do so. The Indictment, logically, should end there. But it doesn't. Count Fourteen, the epilogue, reads as follows:

On or about the first day of April 1971, up to and including the date of this indictment...the defendant John Flynn having knowledge of the actual commission by... of a felony cognizable by a Court of the U.S., ...did willfully conceal said felony and did not, as soon as possible, make known the commission of said felony to any judge or other person in civil or military authority under the United States.

Misprison of a felony is a misdemeanor dressed in felony clothes.

...at common law, the misdeameanor of seeing a felony and failing to prevent it, or of knowing about a felony and failing to disclose the fact of its occurrence, or concealing the felony without any previous agreement

with or subsequent assistance to the felon as could make the concealor an accessory before-or-after the fact.

The offense of misprison of a felony has not been accorded general recognition in the U.S.

(Law Dictionary; Gifis, S ; 1975)

And so, I'm

- a) arrested at gunpoint in my home and paraded out of my apartment building in handcuffs,
- b) thrown in jail for ten days,
- c) robbed of any chance of getting my old job back (Supervisor I, Department of Social Services, 8/65-12/71),
- d) and held on bail for 11 months until the charge is finally dismissed in September 1973.

The defendant-appellant Countercharges:

Count One

that the government had insufficient reason for the collection of the seven 3/31/72-4/7/72 tapes.

Count Two

that my arrest and prosecution constitute false and malicious conduct on the part of the government.

Count Three

that the government agents illegally entered my home (apartment) on 10/16/72.

Count Four

that, upon entry, the government agents did illegally search my apartment and seize \$3,600 of my money, my bankbooks and other personal items.

Count Five

that the bail of \$15,000 set on 10/16/72 constituted a violation of my 8th Amendment rights.

Count Six

that Magistrate Schiffman and Prosecutor Boyd entered into a tacit agreement to pre-set bail in this case.

Count Seven

that between 10/17/72-10/24/72 the government blocked my right to a 24-hour bail reduction hearing.

Count Eight

that the government falsely indicted me on 10/24/72 to keep me in the case, even though there was insufficient evidence to do so.

Count Nine

that the prosecution used the power of its office throughout the entire process of this case to cover-up its own conspiracy to object justice.

The evidence I could bring to support my indictment of the government would far outweigh any evidence of misprison of a felony. And yet, two years and two months later, the same evidential load that produced misprison of a felony would be used to give birth to conspiracy and obstruction of justice. The prosecution hypocrisy spits like pus from a boil.

During the 10/24/72 - 9/14/73 life of misprison, I submitted three pro se motions to the court

- 1) 6/1/73 Suppression of Use
 - a) \$3,600
 - b) other confiscated items

At the hearing on 6/15/73 before Eastern Judge Leo F. Rayfiel, the government said that it did not have to acknowledge a suppression of use motion at that time and the Judge said his hands were tied. Stunned, I realized that the 4th Amendment rights of the individual citizen were entirely in the hands of the prosecution; that there exists a tacit agreement between court and prosecution to suspend "the right of the people to be secure in their persons, homes, papers and effects against unreasonable searches and seizures..." for the benefit of the prosecution's case; that the government can seize my money and property, call it 'evidence' and prevent me from getting a fair hearing to recover my goods. During my odyssey through the Courts of Eastern and Southern, I was to learn that there is no such thing as a proper pre-trial evidentiary hearing in either criminal or civil court. It's all window dressing.

Judge Rayfiel's 6/21/73 decision reads as follows:

Motion to direct the return of \$3,600 and various and sundry articles, all claimed to have been illegally seized from the defendant, is denied, except as to the extent of various and sundry articles that the Customs Department and the U.S. Attorney agree to return to the defendant.

The 'various and sundry' items were returned to me but not before the government photocopied the four bank books that were involved. These photocopies of the suppressed material were later used against me on March 4, 1975 (See Trial Minutes, U.S.A. vs Flynn, 74 CR 1157, p 166, ¶ 7-10).

2) 7/24/73 Motion to Sever at the 8/28/73 hearing before

Judge John R. Bartels (they changed judges in midstream), the dialogue went something like this:

Flynn: Judge, my motion to sever...

Bartels: Denied

Lazarus (govt. attorney): Sir, the District Attorney's office is not opposing the defendant's motion to sever.

And then the motion to sever carried. Why Not?: the prosecution never intended to bring me to trial anyway; at least not on so ludicrous a charge as misprison of a felony.

3) 9/10/73 Motion to Dismiss & Return the \$3,600

Since the prosecution was delaying its planned dismissal of the charge, I submitted my own motion to keep things moving. At the 9/14/73 hearing, my motion was neither acknowledged nor acted upon. The prosecution indicated its decision to dismiss and the judge acted on the government's motion. When I asked Prosecutor Lazarus about the \$3,600, he told me that Eastern was through with the case, but that Southern had put a 'hold' on the money.

The Uncivil Interlude

Southern District Attorney's office now held the seven tapes, the \$3,600 and future government witness options to the use of McGrath and Warshaw of Case One.

On 9/17/73, I spoke To E.G. Sagor, the Southern prosecutor assigned to the "investigation." He told me to send him a letter giving him details. I did so on the same day. When I did not

receive an answer by 10/18/73, I wrote him again as follows:

This will supplement my letter of 9/17/73 and our three telephone conversations.

I am again asking for the return of my money (3,600)....

If you intend to continue to hold the money in question, I am asking that you show cause why the government should be permitted to do so.

Again, no answer. This time I waited until December 1973 before sending my third letter. Still no answer. Meanwhile, the 'case' had gone from Sagor to a second prosecutor and then on to a third, John Kenney, before finding its final resting place with a fourth, Jeremy G. Epstein.

I talked to Kenney but to no avail. Forced to file in Civil Court, I did so on 2/26/74. When the prosecution failed to answer in the required 60 days, I filed a Motion on Time on 5/17/74. Finally, on 5/24/74, the government replied: it asked for more time to file, citing "excusable neglect" as its reason. It was not until 6/25/74 that the government attorney handling the civil end of the case, William G. Ballaine, got around to submitting the required Answer Motion.

Meanwhile, the required pre-trial conference was held in Judge Robert L. Carter's courtroom on 6/13/74. Though the judge pointed out to the prosecution that it did not need the physical presence of the \$3,600 in order to use it as evidence in the 'under investigation' criminal proceedings, the government was adamant: it wanted the physical show of the money for possible

future grand jury and trial purposes. That tacit judge-prosecutor agreement not to disturb the government's idea of evidence held like cement.

Informed by Judge Carter's law clerk that the case would not get to the top of the docket until approximately 9/75, I filed for a summary judgment on 9/16/74. Nothing.

In a last ditch effort to get my money back, I wrote a pleasant letter to Prosecutor Kenney on 11/21/74. My first sentence read: "How about giving me back my money in time for Christmas - 1974?" and my last sentence said: "So don't be a fuck, Kenney: give me back my \$3,600 in time for Christmas - 1974."

I received my answer in the mail on Friday, December 13, 1974: a copy of Indictment 74 CR 1157, charging me with conspiracy and obstruction of justice. The same evidence that gave us misprison of a felony at Eastern in October 1972 is now used to vomit forth the dynamic government duo, conspiracy and obstruction of justice, at Southern.

Case Three (74 CR 1157): The Prosecution Cover-Up

The prosecution cover-up which began at Eastern with the bogus charge of misprison of a felony, reached its pinnacle of deceit in December of 1974 with the Southern charges of conspiracy and obstruction of justice. It is the government, not the appellant, the lawyers of the prosecution, not the citizen pro se, who is and are indictable under the two charges. A classic government cover-up is at work here: simply charge the defendant with the

crimes of the prosecution.

The truest grief is swift and deep and cleansing. It was not grief that I felt on Friday the thirteenth of December when I received notice of the indictment; it was relief: the threat of a Southern indictment had been hanging over my head since 1972. Obstruction of justice I had been led to expect but conspiracy, "the darling of the prosecutor's nursery" was a slight surprise. It takes two to conspire and I knew I had danced all alone.

No prosecutor likes to see obstruction of justice standing there all alone without the gaseous assistance of its partner, conspiracy. However, since even that dumb, insensitive, out-of-town jury could see through the conspiracy charge, I shall not dwell on the charge beyond this paragraphic reference. It is the contention of the defense that both charges were brought as part of a prosecution cover-up: there is not a penny's worth of evidence to substantiate the charge. Further, this unsubstantiated charge was brought as a convenient way to cover the manner in which the government obtained the seven tapes of 3/31/72 - 4/7/72.

Obstruction of Justice

On March 4, 1975 that out-of-town jury found me guilty of obstruction of justice.

The Government Production was directed by Jeremy G. Epstein and starred the testimony of Kathryn A. McGrath, five of the seven tapes and the \$3,600. Also featured in the prosecution cast in showcase, authority and continuity roles were Paul Lazarus, who

took over the Eastern misprison case after Boyd dropped out; Vincent Murano, detective with the N.Y.C. Police Department; Gerard Whitmore, former special agent with the Bureau of Customs. Howard Warshaw waited in the wings but the judge found him unfit to testify and refused to permit him on stage.

Judge Inzer B. Wyatt presided over the Court and 12 Rockland County morphs were sworn in as the jury.

The government's substantive evidence boils down to these three items:

- 1) the testimony of McGrath
- 2) five of the seven tapes
- 3) the \$3,600.

On 2/25/75, I submitted a pre-trial suppression of use motion on

- a) the seven tapes and
- b) the \$3,600.

At a hearing before Judge Wyatt on 2/28/75, both a) and b) were denied.

The defense contends that the collection and use of these tapes constitutes a conspiracy on the part of the government to entrap the defendant into the commission of a crime. This punitive prosecution action was motivated by my four appearances in court on behalf of Kay Hannesson during her 3/1/72 - 3/17/72 bail reduction hearings in connection with Eastern 72 CR 146. The defense contends that the collection and use of these tapes is in violation of my first, fourth and fifth amendment rights. In a case like this, one party consent is nothing more than a

political expediency that adds still one more grenade to an already overstocked prosecution arsenal. One party consent is legalized rape.

I do not here question Judge Wyatt's right to lean on U.S. v. White, 401 U.S. 745: it is the law itself that misinterprets the individual's right to the privacy of her or his conversations. I objected to the introduction of the tapes before the trial, during the trial and I now object to the collection and use of these tapes after the trial. Although these objections may be irrelevant to the Appellate Court's decision, I draw some small comfort in this bicentennial time from the felt knowledge that the people who wrote the Bill of Rights would side with me. A government that relies on pirated private conversations is a government afraid of its people.

The fact that the tapes in question do not contain any evidence of the crime of obstruction of justice in another matter. An important matter to this case, of course, since the tapes occupy the center stage in the prosecution's production. However, before I get into the tapes, I'd like to eliminate the \$3,600 as an evidential factor.

From the minutes of the 2/28/75 hearing before Judge Wyatt, page 27:

The Court: Now, when was the money seized?

Mr. Epstein: In October of 1972.

The Court: In October of 1972.

Mr. Epstein: That is correct.

The Court: And the government's evidence as to the bribe

offer will extend past October 1972 and into 1973?

Mr. Epstein: The Government's evidence as to the pendency of the proceedings which were the object of the obstruction will extend into 1973.

From the Trial Minutes of 3/3/75 - 3/4/75: *p 47, ll 12-16*

The Court: What date do you say he abandoned the bribery scheme?

Mr. Epstein: Your honor, he no longer offered Miss McGrath-- well, he appeared on April 6th [1972] to be unwilling to deal with Miss McGrath any further.

And on page 53 of the same minutes: *ll 8-12*

The Court: I thought you told me in April of 1972 he abandoned-----

Mr. Epstein: It does appear he did. The conversation of April 6th [1972] indicates an abandonment at that time.

Since the 'bribery scheme' ended in April of 1972 and since there was never any real money involved - only conversation about money - how can the \$3,600 be called evidence when it was confiscated from my apartment six months later in October of 1972?

The government's substantive evidence now boils down to these two items:

- 1) the testimony of McGrath
- 2) five of the seven tapes.

All copies of the tapes are currently in the hands of the government. The five used in the trial consist of four telephone tapes (3/31/72, 4/3/72, 4/4/72, and 4/6/72) and one body tape of 3/31/72. My objections exterior to the trial itself have already

been cited; the following objections refer to the internal trial use of the tapes:

1) the 6th Amendment guarantees the accused the right to "a speedy and public trial...." At the trial, the tapes were heard only by the defendant, the prosecution, the judge and the jury. Neither the public nor the court stenographer got to hear them. It is the contention of the defense that such a procedure violates the "public trial" guarantee of the 6th Amendment.

2) While the four telephone tapes are perfectly clear, there is an audibility problem with the 3/31/72 body tape, Government Exhibit 5 (Trial Minutes, p 54, U 4-16).^{*} I challenge the credibility of this tape for these reasons:

a) audibility

b) the prosecution's transcription of the tape is vastly superior to the tape itself (Trial Minutes, p. 175, U 2-19).^{*}

c) the transcription is inaccurate and the inaccuracies serve a two-fold purpose: they picture the defendant in a prejudicial light and cover-up a hearsay reference to an unethical deal between two lawyers.

3) The tapes contain no evidence of the crime of obstruction of justice. As Prosecutor Epstein put it: "But the case is about, more simply and more concretely, is that Mr. Flynn offered a Government witness a \$3,800 bribe not to testify in a major narcotics case." (T.M., p 7, U 13-15).^{*} The tapes were introduced as evidence to support this prosecution contention. Nowhere on the tapes is there a bribe offer of \$3,800 or any other amount.

^{*} U' = ll

McGrath told me that her lawyer was charging \$5,000 and that she had already paid \$1,200. That left a balance of \$3,800 unpaid. The prosecution heard what it wanted to hear but the tapes, the prime evidence, cannot support the government's constant reference to a \$3,800 bribe offer.

Judge Wyatt, after hearing all five tapes, asks Mr. Epstein: "Where is the evidence of the offer of the bribe?" (T.M., p 89, U 16-17).

The \$3,800 in question is an abstract product of subtraction. There never was any \$3,800 in real money, nor was there any bribe offer of any amount.

The government's substantive evidence, then, now boils down to one item: the testimony of Kathryn A. McGrath. McGrath was purportedly on the witness stand to testify about an alleged \$3,800 bribe offer to control or change her testimony. Let the record speak for itself:

1) Epstein: Can you please tell us what she (Priscilla Witt, named in the indictment as an unindicted co-conspirator) said to you and you to her?

McGrath: She (Witt) said that Flynn had some money for me and I said I didn't want to discuss the case or anything to do with it.

Epstein: Did she say anything more than that about why Mr. Flynn had the money?

McGrath: I don't think so. She might have said something to the effect that the money was for me to control my testimony, in terms of the other defendants.

(T.M., p 31, U 15-24)....previous page.

2) Epstein: Miss McGrath, did she [Witt] say what the money would be for?

McGrath: I think she said that the money would be for me to pay legal fees.

(T.M., p 32, U 7-10).

3) Epstein: On page 26 (of 3/31/72 body tape transcript) there are references in the middle of the page to \$5,000 and to \$3,800. What did you take that to mean?

McGrath: That an offer could be made to the defendants or to their attorneys by Mr. Flynn that if I agreed not to turn state's evidence then maybe I could get \$3,800.

(T.M., p 58, U 16-22).

4) Epstein: Miss McGrath, when you arrived at Washington Square Park did you have conversation with Mr. Flynn?

McGrath: Yes, I did.

Epstein: Can you tell us please the substance of that conversation?

McGrath: Well, the substance was that there still might be money available contingent on my either controlling my testimony or just not arriving at court at a trial date.

(T.M. p 71, U 22-25, p 72, U 2-5).

Let it be noted that when asked the Big Money Questions, the government's star witness answered with an "I don't think so" followed by a "might," an "I think," a "maybe" and still another "might." If any logical person can show me how these replies

represent substantive evidence of a bribe offer to obstruct justice, I'll eat the Trial Minutes between two pieces of burnt toast at Foley Square at one in the afternoon.

The government's substantive evidence, then, has now completely boiled away. All that remains is the residue of suggestion, innuendo and plain old bullshit. The entire Government Production is nothing more than deodorized garbage gift-wrapped as perfume and sold to a gullible jury. From a viewpoint of evidence, this case is dust.

After the government rested its case, Judge Wyatt a) informed me of my right to move for a judgment of acquittal, b) let the record show that such a motion had been made and c) denied the motion (T.M., p 115, U 2-6).

In my opening statement, made after the government had rested, I began with..."It is the opinion of the defense...that the government has failed to make a case..." (T.M., p 120, U 4-5). By Wigmore, this statement was true then and it is true now. I move for retroactive acquittal on the obstruction of justice charge or reversal of the jury's decision on the same charge.

After the jury's verdict of March 4, 1975 I submitted two post trial motions to the court of Judge Wyatt, one dated 3/5/75 and the other dated 3/12/75. Wyatt answered the first motion to my satisfaction but he did not choose to respond to the 3/12/75 motion. I now offer paragraph b) of this motion to the Appellate Court for its consideration:

After the jury verdict of 'not guilty' on conspiracy count, adjust the indictment to a one count indictment on the substantive charge,

obstruction of justice. Purged of the conspiracy evidence, the defense moves for an acquittal judgment on the grounds that the remaining evidence is insufficient to support the charge.

The 'remaining evidence' is insufficient to support the charge of jaywalking, let alone a felony rap that carries a maximum penalty of five years in jail and/or a fine of \$5,000.

I am not looking for another trial. The fiscal irresponsibility, moral vacuity and legal callousness of these past proceedings have already gone quite far enough. However, if what I have outlined above is deemed insufficient to overturn the conviction, there are approximately forty errors, large and small, embedded in the hearth of the two-day trial. I shall here cite but one; if others are wanted I shall await instructions of the Court before submitting them.

Cooperative Error of Prosecution and Judge

The ordinary case has two people filling the roles of defense counsel and defendant. If one person fills both positions and that person is a lawyer, the case is unusual. If one person plays both roles and that person is a non-lawyer, the case is very unusual; especially since the judge, in his role as protector and interpreter of the law, must now try to protect, to some added degree, the rights of the pro se defendant without prejudicing the case of the prosecution. When the non-lawyer defendant pro se elects to be the only witness on his own behalf, the case becomes extraordinary. Theoretically, we can see how the use of ordinary case structure in an extraordinary case can lead to error.

Moving from theory to practice, I refer the Court to the

Government's Requests to Charge, Request No. 13 as read to the jury by the judge (T.M. pp 202-203). In a case of this nature, it is an error for the judge to downgrade the testimony of the defendant to any degree when the defendant's entire case is his word.

The content of an extraordinary case cannot be automatically poured into ordinary case structures; it is the content, not the container, that must dictate the shape of the case.

Language, Perspective, Fair Play

Without language, we would not be here today; my reference is to the species. The human animal could not have survived the tough cadence of prehistoric time without the grunt of the word, the evolutionary gift of language.

Law is language: words are the tools of the lawyer's trade. The poet is the musician of the word but the language of the lawyer can limit the human body's movement in time and space; cage it, kill it. Such is the power of the lawyer's prose. Such power should be exercised with caution and temperance.

The prosecution lawyer pontificates about his allegiance to the principles of law while lusting for the pleasure of the Nadjarian come. Government prosecutors trained in the law and paid with public funds and privileged position have many responsibilities. A forgotten one is this: to respect and protect the rights of the defendant to some degree within the medium of the law.

I would like to feature just two instances of prosecution prose from the Trial Minutes:

- 1) "...it is important to the Government that the purity of

of its prosecutions be maintained."

(TM, p 12, U 6-7)

and

2) "Obstruction of justice is one of the most serious crimes in the federal criminal code. It protects the sanctity of the judicial process."

(TM, p 170, U 7-9)

"...purity of its prosecutors..." and "...sanctity of the judicial process" too. 'Purity' and 'sanctity': the language gags. Such puke: tell it to Nixon. And his lawyer cronies too.

And if your hand or foot offend you,
Cut it off, lad, and be whole;
But play the man, stand up and end you,
When the sickness is your soul.
(Housman, A Shropshire Lad; 45-2)

That's language.

Perspective. Gerard of Cremona had it and Robert of Chester had it too. Leonardo da Vinci had a theory about it and Michelangelo had to have it too: its features grace the canvass of three hundred years of Italian Renaissance. Newton really had it and the Bernoulli family had it too. Every discipline has it, so the Law must have it too.

The current assembly line process of the judicial system treats human beings like automobiles; strap 'em down and roll 'em through. No need to know much about what has gone on before, no time to think about what happens after. Just keep the belt rolling.

The defendant becomes the victim of a legal system that serves only the lawyer: the defense attorney gets munificent fees from

the victim for talking to the prosecutor about the applicability of the law to his client's situation; the prosecution attorney, comfortably funded by the public, shoots for the power and the glory and the promotion of the conviction; the judge, surrounded by his court retinue, sits on his throne in splendid isolation, listens, referees, proclaims, and tries to add a touch of pomp and piety to the whole affair. A moveable feast: surgery without anesthetics performed by lawyers on the run. If the lawyer's brother professional, the medicine man, can perform between two and three million unnecessary operations a year, can the number of unnecessary prosecutions be far behind?

In this case, the perspective of the prosecution is that of a straight line in a world of curve. As the Appellate Court reviews this case, I ask that it consider from the point of view of its own perspective these two questions:

1) What did this guy really do that constitutes a federal crime?

2) Why did the government lawyers come after this guy in such a seemingly unethical fashion?

If the punishment should fit the crime, then the pursuit should have a speed limit concomitant with the alleged legal transgression. If the government lawyers had any sense of perspective to begin with, the focus was lost as the case travelled through the hands of the seven Eastern and Southern prosecutors who touched it.

To see a World in a grain of sand,
And a Heaven in a wild flower;
Hold Infinity in the palm of your hand,
And eternity in an hour.
(Blake, stanza from Argurys of Innocence)

That's perspective.

Fair play. Down here in the back streets, justice is one of the words politicians use when they want to get elected. A fair shake, a square deal, fair play: these phrases are a little more understandable.

Fair play should mean some presumption of 'innocent until proven guilty.' But when you're thrown in jail for ten days, carted from jail to court and back to jail in handcuffs locked to a chain around your waist; when you're prevented from earning a living because of an 11-month wait for the dismissal of misprison of a felony; when the same load of evidence insufficient to support misprison is resurrected two years later to create conspiracy and obstruction of justice; well, you get the notion that the prosecution has declared you guilty until proven innocent.

In my opinion, the prosecution lawyers violated my 1st, 4th, 5th, 6th and 8th Amendment rights. The government has stolen the Bill of Rights, the document specifically designed to protect the individual citizen from the power abuses of the government. The Fourth consumes the First and lies arrested in the graveyard of the lawyer's prose. The prosecution holds the jailer's key and bars all entry to the hymn of hope.

Article IV

The right of the people
to be secure in their person,
houses, papers, and effects
against unreasonable searches and seizures,
shall not be violated,

And no Warrants shall issue,
 but upon probable cause,
 supported by Oath and affirmation,
 and particularly describing the place to be searched,
 and the persons or things to be seized.

Let not false precedent melt that early word, nor steal the
 string from this our common pearl. Let Judge be Franklin as he
 thought and felt when that fresh wind first blushed its early grace
 across the sea to quicken Europe's pulse. In this centennial
 year we are but two, an infant dying of old age.

Equal justice undermined by law: Nixon, Agnew, Dean, Segretti,
et alii, have buried this concept right between the eyes of our
 country. In our present Orwellian state, 1984 arrived before 1976:
 some people are more equal than other people and for them, crime
 pays high wages. I don't want or need a pardon from Ford and I
 don't qualify for a \$60,000 per year pension: just vote me \$253,000
 the first year and \$125,000 the next and see what I can do.

That's fair play.

Turning and turning in the widening gyre
 The falcon cannot hear the falconer;
 Things fall apart: the center cannot hold;
 Mere anarchy is loosed upon the world,
 The blood-dimmed tide is loosed, and everywhere
 The ceremony of innocence is drowned;
 The best lack all conviction, while the worst
 Are full of passionate intensity.

Surely some revelation is at hand;
 Surely the Second Coming is at hand.
 The Second Coming! Hardly are those words out
 When a vast image out of Spiritus Mundi
 Troubles my sight: somewhere in the sands of the desert
 A shape with lion body and the head of a man,

A gaze blank and pitiless as the sun,
Is moving its slow thighs, while all about it
Reel shadows of the indignant desert birds.
The darkness drops again; but now I know
That twenty centuries of stony sleep
Were vexed to nightmare by a rocking cradle,
And what rough beast, its hour come round at last,
Slouches towards Bethlehem to be born?
(Yeats, The Second Coming)

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Appendix

An appendix consists of supplementary material usually attached at the end of a piece of writing. In this case, the brief contains the appendix. However, I could add just a few short notes:

The grand jury system is the prosecutor's nursery. Its indictments should start with "The Prosecution Charges:" and, for reasons of honesty and efficiency, it should be identified as a sub-divisional wing of the District Attorney's Office.

Misprison of a felony should be placed in the hands of judges and used as a club to chastise wayward lawyers. A gem so rare should be reserved for intramural activities within the \$400,000 club.

Conspiracy and obstruction of justice are the hydrogen and the oxygen of the prosecutor's trade. When jointly brought, only a conviction on both should be allowed to condense to water.

The defense rests.